The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

IN RE WASHINGTON MUTUAL MORTGAGE BACKED SECURITIES LITIGATION,

This Document Relates to: ALL CASES

Master Case No. C09-037 MJP

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO PRECLUDE USE OF UNTIMELY DISCLOSED EXPERT OPINIONS OF IRA HOLT AND CHARLES D. COWAN PURSUANT TO FED. R. CIV. P. 37(c)(1)

NOTE ON MOTION CALENDAR:
June 22, 2012

ORAL ARGUMENT REQUESTED

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Statutes & Rules

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EXPLANATION OF CITATION FORMS

The following citation forms are used in this memorandum:

- "Sanfilippo Decl." for references to the Declaration of Michael A. Sanfilippo, dated June 22, 2012, and documents attached as exhibits thereto.
- "5/25/12 Holt Decl." for references to the Daubert Motion Declaration of Ira Holt, dated May 25, 2012, previously submitted by Plaintiffs as Exhibit 1 to the May 25, 2012 Declaration of Daniel B. Rehns (Dkt. 425).
- "Defs. Br." for references to Defendants' Motion To Preclude Use of Untimely Disclosed Expert Opinions of Ira Holt and Charles D. Cowan Pursuant to Fed. R. Civ. P. 37(c)(1), dated June 7, 2012 (Dkt. 435).
- "Pls. Br." for references to Plaintiffs' Opposition to Defendants' Motion To Preclude Use of Untimely Disclosed Expert Opinions of Ira Holt and Charles D. Cowan Pursuant to Fed. R. Civ. P. 37(c)(1), dated June 18, 2012 (Dkt. 444).
- "Holt Report" for references to the Expert Report of Plaintiffs' proposed expert, Ira Holt, dated March 2, 2012, previously submitted as Exhibit 2 to the April 25, 2012 Declaration of J. Wesley Earnhardt (Dkt. 407).
- "Ostendorf Report" for references to the Expert Report of Defendants' proposed expert, George Ostendorf, dated March 30, 2012, previously submitted as Exhibit 3 to the April 25, 2012 Declaration of J. Wesley Earnhardt (Dkt. 407).
- "Judgment on Pleadings Opp." for references to Plaintiffs' Opposition to Defendants' Motion for Judgment on the Pleadings, dated Sept. 16, 2011 (Dkt. 327).
- "Class Cert. Hearing Transcript" for references to the Corrected Verbatim Report of Proceedings Before the Honorable Marsha J. Pechman on October 13, 2011 (Dkt. 343).
- "12/19/11 Transcript" for references to the Official Transcript of Telephone Conference held on December 19, 2011, before Judge Marsha J. Pechman (Dkt. 361).

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Plaintiffs do not dispute that they received the relevant loan files in mid-2011 and designed a sample to review by December 2011, but then waited until February 2012 (less than a month before the expert deadline) to commence that review. (Defs. Br. at 3.) Having offered opinions as to only 424 loans by the expert report deadline, Mr. Holt now purports to opine on an additional 1,027 loans (and intends to continue opining on nearly 1,000 more through the eve of trial)—in what Plaintiffs term an "elaboration" on his prior report. Mr. Holt and his staff have already spent over 3,400 hours on this "elaboration," and responding to his untimely new opinions (if they are ever disclosed) would require Defendants to expend similar resources when the parties should be preparing for trial. Moreover, it is now clear that Plaintiffs do not intend to make any disclosure at all of Mr. Holt's specific conclusions or underlying data for the additional loans, without which Defendants are denied the ability to assess or respond to his opinions. Plaintiffs' untimely expansion of the scope of Mr. Holt's opinions and simultaneous failure to provide Defendants any reasonable opportunity to respond should be rejected.

I. Mr. Holt's Purported Findings Concerning 1,963 Additional Loans Are New Opinions Based on New Analyses That Were Required To Be Disclosed By the Expert Deadline.

Mr. Holt was engaged "to review a sample of loans for their compliance with Washington Mutual's underwriting." (Holt Report at 1.) He reviewed a sample of 424 loans and opined "based on [his] experience as an underwriter" as to whether each loan complied with WMB's underwriting guidelines or was, in his view, "materially defective." (Id. at 1-3.) Those loan-level conclusions were the entire substance of Mr. Holt's opinion.

Plaintiffs now argue that Mr. Holt's determinations about purported defects in 1,963 additional loan files are not new opinions (and need not be disclosed) because those individual determinations, in the aggregate, purportedly are consistent with the conclusions he reached regarding the original 424 loans. (Pls. Br. at 2-4.) Plaintiffs are wrong. Carried to its logical conclusion, their position would nullify Rule 26(a)(2)'s requirement that expert reports

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contain "a complete statement of **all opinions** the witness will express **and the basis and reasons** for them" and would allow Plaintiffs to expand their analysis uninhibited by adversarial testing or Court deadlines under the guise of "reinforcing" or "elaborating" on an opinion based only on a small percentage of the loan sample and underlying data. See Plumley v. Mockett, No. CV 04-2868-GHK (Ex), 2010 WL 8160423, at *2 (C.D. Cal. May 26, 2010) (untimely attempts to "strengthen or deepen opinions expressed in the original report" "circumvent the full disclosure requirement implicit in Rule 26"); Dixie Steel Erectors, Inc. v. Grove U.S., L.L.C., No. CIV-04-390-F, 2005 WL 3558663, at *8 (W.D. Okla. Dec. 29, 2005) (party cannot "send[] its expert back to the drawing board or back into the laboratory to do significant additional work after the original report has been rendered").

Mr. Holt's purported findings regarding the nearly 2,000 previously un-reviewed loans are not a mere "elaboration" on his original opinions, but rather new conclusions based on new (and still undisclosed) analyses. Indeed, even assuming Mr. Holt spent seven hours on each loan in his initial review, he has already spent considerably more time on his "elaboration" than on his report. (See Holt Report at 7 (noting each of the 424 original loans took "up to several hours" to review).) The out-of-circuit cases Plaintiffs cite for the unremarkable observation that an expert is not limited to the literal contents of his report are inapposite. See, e.g., Thompson v. Doane Pet Care Co., 470 F.3d 1201, 1202-04 (6th Cir. 2006) (accountant could testify that opinions were based on GAAP without having specifically stated those "magic words" in his report); In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 643 F. Supp. 2d 471, 482 (S.D.N.Y. 2009) (nondisclosure of actual market share percentage in initial report did not render it incomplete, where report "spelled out precisely how to perform the exceedingly simple calculation" and disclosed necessary data).

The "rules of expert disclosure are designed to allow an opponent to examine an expert opinion for flaws and to develop counter-testimony through that party's own experts."

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S. States Rack & Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592, 598 (4th Cir. 2003); see also Nw. Pipeline Corp. v. Ross, No. C05-1605RSL, 2008 WL 1744617, at *10 (W.D. Wash. Apr. 11, 2008) (untimely disclosure of additional expert opinions deprives opponent of ability to "contradict or rebut"). Defendants are denied the opportunity to do that because Plaintiffs have failed timely to disclose Mr. Holt's new opinions, let alone the supporting data and analysis. Plaintiffs contend they need not disclose Mr. Holt's new opinions because his "methodology" has not changed. (Pls. Br. at 6, 11.) That is wrong. Under Mr. Holt's "methodology," the evaluation of an individual loan's adherence to the underwriting guidelines is a highly fact-specific, judgment-based determination not susceptible to mechanical application. Mr. Holt did not employ an algorithm that could be applied to additional loans, bypassing the need for a file-by-file analysis; instead, his conclusions require a review of the loan file at issue and application of judgment and "experience as an underwriter" (Holt Report at 2). Plaintiffs do not suggest otherwise. Thus, Mr. Holt's initial report provides no key from which Defendants can identify or respond to the purported issues he might opine exist in the 1,963 additional loans.

Plaintiffs' argument that Defendants could have re-underwritten loans themselves (Pls. Br. at 2) misses the point. Defendants are not required to offer their own post-hoc opinion based on "re-underwriting"—the contemporaneous record already makes plain that WMB had sound underwriting practices and that the overwhelming majority of loans reflect acceptable credit decisions (see Defendants' Motion for Summary Judgment (Dkt. 383) at 5-24), and Plaintiffs themselves previously asserted (when it suited their purposes at the time) that a loan-by-loan review was "immaterial." (See Judgment on Pleadings Opp. at 2 n.6; Class Cert. Hearing Transcript at 25:1-19.) The only reason Defendants reviewed individual loan files is to respond to Mr. Holt's opinions, and that cannot be done without timely and full disclosure of those opinions and the basis for them. But Plaintiffs have withheld even the most basic facts about Mr. Holt's new opinions, including which loans Mr. Holt deems "materially defective."

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See Quapaw Tribe of Okla. v. Blue Tee Corp., No. 03-CV-0846-CVE-PJC, 2010 WL 3909204, at *4 (N.D. Okla. Sept. 29, 2010) (excluding untimely supplemental expert opinions that applied analysis from initial report to newly sampled data, noting that "defendants must be given a reasonable opportunity for their own experts" to consider the new findings).

In addition, Plaintiffs do not—and cannot—dispute the numerous Ninth Circuit cases that have held that untimely expert opinions offered to bolster earlier ones should be excluded under Rule 37(c) absent a showing of substantial justification or harmlessness. (See Defs. Br. at 7-12.) A party cannot "attempt[] to bolster [its expert's] previously disclosed opinions and immunize them from attack" by conducting additional tests after the disclosure deadline. Presstek, Inc. v. Creo, Inc., No. 05-cv-65-PB, 2007 WL 983820, at *5 (D.N.H. Mar. 30, 2007). Plaintiffs' conduct is even more objectionable because they have not actually disclosed Mr. Holt's new opinions or the basis for those new opinions.

The largely out-of-circuit cases from which Plaintiffs selectively quote do not help them. Those cases address reformulations of previously disclosed expert opinions, not new opinions based on long-available, but previously un-reviewed, evidence. See, e.g., Emcore Corp. v. Optium Corp., No. 6-1202, 2008 WL 3271553, at *3-5 (W.D. Pa. Aug. 5, 2008); Cornell Research Found., Inc. v. Hewlett-Packard Co., No. 5:01-CV-1974 (NAM/DEP), 2007 WL 4349135, at *20 (N.D.N.Y. Jan. 31, 2007) (declining to exclude declaration that "d[id] not interject new materials or theories that were not disclosed in his comprehensive reports in this matter" and simply explained or "reiterate[d] information and opinions set forth in meticulous detail in his expert reports"); Schmude v. Tricam Indus., Inc., 550 F. Supp. 2d 846, 854 (E.D. Wis. 2008) aff'd, 556 F.3d 624 (7th Cir. 2009) (minor clarification on point that was "not significant to [expert's] opinion" and was already known and discussed by opponent's expert).

Finally, Plaintiffs' portrayal of Mr. Holt's continued re-underwriting as an attempt to respond to Defendants' Daubert motion (filed in late April 2012) is belied by their own prior

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statements. Plaintiffs indicated to the Court in December 2011 that they intended to re-underwrite approximately 2,500 loans. (12/19/11 Transcript at 3, 15.) Regardless, Mr. Holt's additional loan review is not a defense of his original opinions in response to criticism, but rather an attempt to cure his failures through untimely new testing. That is prohibited. Palmer v. Asarco Inc., No. 03-CV-0498-CVE-PJC, 2007 WL 2254343, at *3-4 (N.D. Okla. Aug. 3, 2007) (expert cannot bolster initial opinions in response to Daubert challenge through additional testing which he "could have performed . . . in a timely fashion"); Presstek, 2007 WL 983820, at *5 (expert cannot "conduct additional tests to respond to criticism leveled by an opposing party's experts after agreed-upon disclosure deadlines have passed"). Mr. Holt's ongoing review bears no relation to the kind of supplementation allowed in the cases Plaintiffs cite. See, e.g., Allgood v. Gen. Motors Corp., No. 102CV1077DFHTAB, 2006 WL 2669337, at *4-5 (S.D. Ind. Sept. 18, 2006) (supplemental opinions merely responded to specific criticisms or "harmlessly repeat[ed] information" from previous reports and thus did not "ambush" opponent with new information); Single Chip Sys. Corp. v. Intermec IP Corp., 495 F. Supp. 2d 1066, 1075 (S.D. Cal. 2007) ("the majority of the opinions [in the supplemental disclosure] were given extensive discussion" in earlier disclosures, and court declined to rely on other undisclosed opinions).

II. Plaintiffs' Failed Disclosure Is Not Substantially Justified or Harmless.

Plaintiffs do not dispute that they failed to start reviewing loan files, which they have had since mid-2011, until 29 days before their expert report was due. (Defs. Br. at 3.) The expert disclosure deadlines in this case have been in place since September 2011 (Dkt. 335), but Plaintiffs have never sought relief from those deadlines. (Defs. Br. at 12.)

Plaintiffs have not met their burden to show substantial justification. (See Defs. Br. at 11-12); Presstek, 2007 WL 983820, at *7 (excluding supplemental expert opinions based on additional testing because party had "no good explanation for its failure to have [its expert] perform the tests described in the supplemental disclosure at a time when it could have included

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the results in its initial disclosure"); Palmer, 2007 WL 2254343, at *3-4. Nor have Plaintiffs shown harmlessness—to the contrary, their refusal to disclose Mr. Holt's new opinions or the underlying data continues to harm Defendants by denying them the opportunity to respond. Plaintiffs do not dispute that the review of each loan is a laborious, fact- and time-intensive process. (See Defs. Br. at 8.) Mr. Holt explained that "some [loan] files exceed[] 2,100 pages in length" and that review "can take up to several hours for each loan, even for an experienced underwriter." (Holt Report at 7; see also Sanfilippo Decl. ¶ 2 & Ex. 1 (exhibit from Mr. Ostendorf's report illustrating complexity of analyzing a single loan).) Plaintiffs have not only given themselves a nearly four month head start on this process (which has already taken them in excess of 3,437 hours of work (5/25/12 Holt Decl. at 1)), but apparently intend to preserve that advantage by never producing any supporting information about Mr. Holt's new analyses.

Defendants' ability to depose Mr. Holt does not cure the harm. Seven hours of questioning by counsel could not possibly uncover sufficient information about Mr. Holt's views on each of the 1,963 additional loans to enable Defendants' expert substantively to respond to Mr. Holt's conclusions. See Nw. Pipeline, 2008 WL 1744617, at *9-10 (expert deposition does not cure untimely disclosed opinions because opponent deprived of ability to "contradict or rebut" through own expert, and would disrupt Court's schedule and "render Rule 37(c)(1) toothless"); Spurlock v. Fox, No. 3:09-cv-0756, 2010 WL 3807167, at *4 (M.D. Tenn. Sept. 23, 2010) ("To create an exception to Rule 26 when a party declines to depose a witness would defeat one of the primary purposes of Rule 26.").

CONCLUSION

Defendants respectfully request that the Court grant Defendants' Motion to Preclude Use of Untimely Disclosed Expert Opinions of Ira Holt and Charles D. Cowan.

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DATED this 22nd day of June, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of June, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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